IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

S.B. CIVIL WRIT PETITION NO.996/2007
(M/s. Venus Marbles & Minerals Vs. State of Raj. & Ors.)

Date of Judgment : July 26th, 2007

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Sanjeev Johri, for the petitioner.

By way of filing the present writ petition, the assessee-petitioner is challenging the confirmation order dated 15.11.2003 (Annexure-2) passed by Dy. Commissioner (Administration), Commercial Taxes Department, Udaipur as well as the ex-parte assessment order dated 19.1.2001 (Annexure-3) including the demand notice dated 19.1.001 passed by assessing authority.

According to the facts inter alia narrated in the writ petition, an ex-parte assessment order dated 19.1.2001 was passed by the assessing authority for the assessment year 1998-99 (CST) and a demand of tax of Rs.96,971/-, surcharge Rs.3,061/-, interest

Rs.48,910/- and penalty Rs.4,020/-, total Rs.1,52,962/- was created against the assessee-petitioner. The assessee-petitioner moved an application before the Dy. Commissioner (Administration), Department of Commercial Taxes, Udaipur under Section 38 of the Rajasthan Sales Tax Act, 1994 (hereafter, "the Act" only) for setting aside the ex-parte assessment order dated 19.1.2001 and for re-opening of ex-parte assessment. The said application was decided vide order dated 15.11.2003 by the Dy. Commissioner (Administration) while holding that the notice for assessment was served upon the assessee and despite this information, the assessment proceedings was not attended to by the assessee and, therefore, the said application under Section 38 of the Act was rejected.

The aforesaid order dated 15.11.2003 was further challenged by way of filing an appeal before Tax Board, Ajmer. The learned Tax Board vide order dated 4.8.2005 rejected the appeal filed by the petitioner while holding that appeal against the order passed under Section 38 of the Act by Dy. Commissioner (Administration) under the said provision was provided in the statute (Rajasthan Sales Tax Act, 1994) only w.e.f. 12.7.2004 and before that date there was no provision of appeal. Therefore, in this view of the matter, the aforesaid appeal of the assessee-petitioner was filed on 10.2.2004 prior to coming into

force of the said provision, was held to be not maintainable. In these circumstances, when the appeal of the assessee-petitioner was rejected by learned Tax Board while holding it to be not maintainable, then, he has chosen to file the present writ petition and prayed for quashing of the order dated 19.1.2001 (Annexure-3) passed by the assessing authority so also the confirmation order dated 15.11.2003 (Anneuxre-2) passed by the Dy. Commissioner (Administration), Department of Commercial Taxes, Udaipur. Further, it is prayed that the ex-parte proceedings for the assessment year 1998-99 (CST) may be declared illegal in toto and same ought to have been cancelled under Section 38 (1) of the Act.

It is submitted by the learned counsel for the petitioner that initially an order of assessment was passed without hearing the assessee-petitioner, therefore, he filed an application under Section 38 of the Act before the Dy. Commissioner (Administration) on 17.10.2003 in which it was prayed that application under Section 38 of the Act may be allowed and opportunity of hearing may be granted to him and case may be reopened. However, this prayer was not acceded to by learned Dy. Commissioner (Administration) and he straight-away rejected the said application while observing in the order dated 15.11.2003 that before passing the assessment order by the assessing authority, notices were issued and duly served upon

the assessee-petitioner and the assessee-petitioner did not appear, therefore, there is no ground for reopening the assessment order. Therefore, the application filed under Section 38 of the Act was rejected.

On 10.5.2007, in one of the connected writ petitions being SB Civil Writ Petition No.997/2007, learned counsel for the petitioner was directed to make available the copy of the application filed under Section 38 of the Act for perusal of the Court. Today, learned counsel for the petitioner has filed certified copy of the application dated 17.10.2003 moved under Section 38 of the Act along with the affidavit filed before Dy. Commissioner (Administration), Commercial Taxes Department, Udaipur and prayed that the said application was required to be allowed and the case requires to be reopened.

Learned counsel for the petitioner has not challenged the order passed by learned Tax Board whereby the learned Tax Board has held that the appeal filed by the petitioner was not maintainable on the date it was filed because the provision of appeal was inserted in the Act later on.

I have heard learned counsel for the petitioner and perused the record of the case as well as application filed under Section 38 of the Act

before the Dy. Commissioner (Administration), Commercial Taxes Department, Udaipur.

From perusal of the record of the case, it is clear that it is not disputed by the petitioner that notice was issued by the assessing authority prior to passing of the order of assessment. It is also not specifically shown how the assessment order passed by the assessing authority is illegal. From the submission of the petitioner also, the only controversy in the present writ petition is with regard to rejection of the petitioner's application under Section 38 of the Act and his prayer for re-opening the assessment proceedings. Section 38 of the Act reads as follows :-

> "38. Re-opening of ex-parte assessment.- (1) Where an assessment has been made ex-parte to the best of judgement of the assessing authority under section 27, 28, 29 or 30, Deputy Commissioner (Administration) may, on the application of the dealer made within thirty days of the date of service of the notice of demand in consequence of such assessment, by an order, direct the assessing authority to cancel the assessment and proceed to make fresh assessment in accordance with the law.
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> (2) Before issuing directions under sub-section (1), the Deputy Commissioner (Administration) should be satisfied that the applicant dealer did not

> receive notices or summons issued to him under section 27, 28, 29 or 30 or that he was prevented by sufficient cause from complying with any notice or summon issued to him for assessment.
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> (3) Where the order for cancellation of the assessment under sub-section (1) has been passed, the assessing authority shall make the fresh assessment within sixty days from the communication of the order passed by Deputy Commissioner (Administration) under sub-section (1)."

Obviously, under the afore-quoted provisions, the limitation is prescribed of thirty days from the date of service of notice of demand. In this case, the assessment order was made on 19.1.2001 and the petitioner moved application under Section 38 of the Act for reopening the assessment order for the year 1998-99 (CST) on 17.10.2003 i.e. at highly belated stage. In these circumstances, the reason which is mentioned in the order passed by Dy. Commissioner (Administration) upon the application filed by the petitioner under section 38 of the Act does not require any interference by this Court.

The application for reopening of the assessment was to be preferred within 30 days from the date of receipt of demand. In the application filed under Section 38 of the Act, it is nowhere mentioned by the petitioner that notices were not served upon him. The only assertion was made that order has been

passed ex-parte and without providing opportunity of hearing, therefore, the matter may be reopened. The observation made by Dy. Commissioner (Administration) in the order that notices were served upon the petitioner and thereafter, the assessment was made, cannot be disbelieved because the petitioner has not controverted the fact that notice issued by the assessing authority was not served upon him. Further, in the writ petition also, it is nowhere mentioned that how the order of assessing authority is bad. In these circumstances, the order impugned does not require any interference by this Court. It is also made clear that in the present writ petition, the petitioner has not challenged the order passed by learned Tax Board against which only revision under Section 86 of the Act is maintainable.

In the facts and circumstances of the case, I see no good ground for interference in the order impugned.

Hence, the writ petition is dismissed.

(GOPAL KRISHAN VYAS), J.

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